

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 25, 2016 appellant, then a 45-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 2016 he sustained a gunshot wound to the top of the right foot and shrapnel in the right forearm when executing a warrant while in the performance of duty. OWCP initially accepted the claim for open wounds of the right upper arm and right foot.

On April 29, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated December 19, 2018, OWCP granted appellant a schedule award for 1 percent permanent impairment of the right lower extremity and zero percent permanent impairment of the right upper extremity. The period of the award ran for 2.05 weeks from January 18 through February 1, 2018.

In a report dated November 19, 2019, Dr. John W. Ellis, a Board-certified family practitioner, evaluated appellant and rated his permanent impairment. He noted that on April 23, 2016 appellant sustained a rifle gunshot in his right forearm and right foot between the base of the great toe and second toe metatarsophalangeal joints. Appellant continued to experience pain in his right forearm, which contained a foreign body, as well as numbness of the right ring and little fingers, tightness and tenderness in the medial epicondyle of the right elbow, and decreased grip strength and use of his right upper extremity. He also continued to experience pain in the metatarsophalangeal joints of the right great toe and second toe. Appellant walked with an antalgic gait and limp with pain in the dorsum of the right foot up into the anterior and medial aspect of the tibia. Physical examination of the right arm demonstrated an entrance wound on the ulnar aspect of the inner arm with tenderness, tenderness and hypertrophy of the medial epicondyle, pain on the ulnar aspect of the right wrist, decreased sensation to light touch, a positive Tinel's sign over the cubital tunnel, and numbness in the ring and little finger upon application of pressure to the cubital tunnel and the gunshot wound scarring. Range of motion (ROM) of the right elbow demonstrated 60 degrees of pronation, 60 degrees of supination, while ROM of the right wrist demonstrated 60 degrees of dorsiflexion, 50 degrees of palmar flexion, 10 degrees of radial deviation, and 30 degrees of ulnar deviation. Physical examination of the right lower extremity demonstrated: a cosmetically deforming scar in the dorsum of the right foot and under the foot, proximal to the great toe metatarsal joints; a loss of sensation along the digital nerves between the great toe and second toe of the right foot; tenderness of the dorsum of the right foot extensor tendons up into the inner aspect of the right knee and proximal tibia consistent with the injury to the tendons of the right foot causing contractures up into the right knee; and decreased ROM. Dr. Ellis noted that reflexes were absent in the biceps, wrists, knees, and ankles. He diagnosed open wounds to the right upper extremity and right foot.

Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ Dr. Ellis calculated nine percent

⁴ A.M.A., *Guides* (6th ed. 2009).

permanent impairment of the right upper extremity using the diagnosis-based impairment (DBI) method, utilizing the diagnoses of crushing injury to the forearm, crushing injury to the tendons of the right forearm and elbow, medial epicondylitis of the right elbow, and cubital tunnel syndrome with median nerve entrapment; and seven percent permanent impairment based upon the ROM method. He calculated 3 percent impairment of the right lower extremity based on the DBI method, utilizing the diagnoses of crushing injury and tendon injury of the right foot and digital nerve impairment, and 18 percent impairment of the right lower extremity based on the ROM method. Dr. Ellis explained that, if the A.M.A., *Guides* provided more than one method to rate a particular impairment or condition, the method producing the higher rating must be used, referring to Table 2-1 and Figures 15-2 and 16-2 of the A.M.A., *Guides*.

On December 2, 2019 appellant filed a Form CA-7 for an increased schedule award.

On January 10, 2020 OWCP referred the record, including a statement of accepted facts, to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. In a report dated January 14, 2020, Dr. Harris reviewed the medical record, including the November 19, 2019 report from Dr. Ellis. Referencing the sixth edition A.M.A., *Guides*, he calculated that appellant had eight percent permanent impairment of the right upper extremity based on appellant's forearm wound and impaired ulnar nerve sensation. Dr. Harris noted that the A.M.A., *Guides* advised that, if motion loss is present, this impairment may alternatively be assessed using the ROM method. Under the ROM method, he calculated that appellant had 10 percent permanent impairment of the right upper extremity, and that, as this was greater than the impairment calculated under the DBI method, the 10 percent impairment under the ROM method should be used. With regard to appellant's right lower extremity, Dr. Harris calculated that appellant had three percent permanent impairment of the right lower extremity based on his accepted diagnosis of open wound and residual problems with digital nerve injury. He stated that appellant's right lower extremity condition did not meet any of the criteria contained in the A.M.A., *Guides* to be calculated by the ROM method, as ROM was to be used as a stand-alone rating for lower extremities if there was no applicable diagnosis to be rated under the DBI method, or in the rare case of severe injury that was not otherwise ratable. Dr. Harris noted that appellant's date of maximum medical improvement was November 19, 2019. He disagreed with Dr. Ellis' use of the ROM method for rating the percentage of permanent impairment for appellant's right lower extremity as it did not meet the criteria to be rated using the ROM method under the sixth edition of the A.M.A., *Guides*.

On February 13, 2020 OWCP requested clarification from Dr. Harris with regard to his January 28, 2020 report and whether appellant had any consequential injuries that ought to be accepted as work related and if so, whether such conditions would alter his impairment ratings.

In a supplemental report dated February 21, 2020, Dr. Harris noted that Dr. Ellis stated that appellant developed right medial elbow epicondylitis, right cubital tunnel syndrome, and right knee tendinitis as a consequence of his accepted work injuries, but that he did not provide any explanation for how these conditions were causally related to the accepted work injury. He opined that the weight of the medical evidence did not support causal relationship between the diagnosed right medial epicondylitis of the elbow, right cubital tunnel syndrome, or right knee patella tendinitis as a result of his accepted work-related injury. Dr. Harris stated that appellant also sustained a digital nerve injury to appellant's right foot as a result of his accepted traumatic injury.

By decision dated April 10, 2020, OWCP expanded acceptance of the claim to include a right foot digital injury.

By separate decision also dated April 10, 2020, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity and 2 percent additional impairment of the right lower extremity (totaling 3 percent right lower extremity permanent impairment of). The award ran for 35.3 weeks from November 19, 2019 through July 23, 2020.

On June 22, 2020 appellant, through counsel, requested reconsideration of OWCP's April 10, 2020 schedule award decision. In a letter dated June 15, 2020, counsel argued that the DMA was incorrect in his application of the sixth edition A.M.A., *Guides* and that Dr. Ellis' application of the A.M.A., *Guides* was correct in utilizing the ROM method for appellant's lower extremity to find a total 18 percent permanent impairment of the right lower extremity. Counsel referenced a letter from Dr. Ellis dated May 21, 2020 explaining his use of the ROM method, and a schedule award monograph.⁵

Appellant resubmitted the November 19, 2019 report of Dr. Ellis.

By decision dated July 23, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the

⁵ The Board notes that neither the referenced May 21, 2020 letter from Dr. Ellis nor the referenced schedule award monograph are found in the case record as transmitted to the Board.

⁶ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's June 22, 2020 timely request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he it did not advance a relevant legal argument not previously considered by OWCP. In support of his reconsideration request, appellant submitted a letter dated June 15, 2020, in which counsel argued that the DMA was incorrect in his application of the sixth edition A.M.A., *Guides* and that Dr. Ellis' application of the A.M.A., *Guides* was correct in utilizing the ROM method for appellant's lower extremity to find a total of 18 percent permanent impairment of the right lower extremity. However, counsel's argument was previously considered by OWCP. Consequently, counsel did not allege a relevant new legal argument and appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. The underlying issue in this case is medical in nature, but he did not submit relevant and pertinent new evidence in support of his request for reconsideration. As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹¹

The Board accordingly finds that appellant has not met any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment. *See P.T.*, Docket No. 20-0040 (issued May 17, 2021).

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board